No. 82-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FREDERICK PAUL,
Petitioner,
v.
THE UNITED STATES

AND

BARRY JACKSON AND THOMAS FENTON,
Petitioner,
v.
THE UNITED STATES

REPLY BRIEF OF PETITIONERS AND APPENDIX

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May 9, 1983

QUESTIONS PRESENTED: RESTATED

1. Does the voidance by Congress of certain federally approved contract rights for attorneys' fees, which is incidental to its undisputed powers under the Indian Commerce Clause, raise an issue cognizable in the District Court for an injunction or in the Court of Claims for just compensation?

2. Does the invocation of alleged First and Fifth Amendment protections in the regulation of an attorney's fee contract, grounds not previously considered by the Supreme Court in its prior consideration of attorneys fee regulatory cases, justify the grant of certiorari in this proceeding?

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REPLY BRIEF OF PETITIONERS AND APPENDIX

INTRODUCTION

The government's Brief in Opposition raises essentially two points: first, that the Petitioners are barred by §10 of ANCSA and the doctrine of res judicata arising from the companion litigation[1] from challenging the constitutionality of the statute and secondly, that, in all events, the result is correct on the merits as consistent with this court's reasoning under the Calhoun v. Massie, 253 U.S. 170 (1920) line of cases; that the First Amendment connection is "tenuous" at best; and that administrative approval of a contract does not vest future rights in government property or in any manner subvert the Congress' dominant constitutional power under the Indian Commerce and Property Clauses.

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[1] Paul v. Andrus, 639 F 2d 507 (9th Cir., 1980); Jackson and Fenton v. U.S., 485 F.Supp. 1243 (D.C., Alas., 1980).

I. PETITIONERS HAVE NEVER HAD THE REMEDY OF INJUNCTION IN THE DISTRICT COURT AND THUS RELIEF, IF PROPER, IS OBTAINABLE SOLELY UNDER THE TUCKER ACT BEFORE THE COURT OF CLAIMS (NOW CLAIMS COURT OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT).

The government argues that if the voidance of Petitioners' contracts was indeed constitutionally infirm, "the proper remedy would be simply to strike it down". (Brief in Op., p.11) citing Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935). In other words, enjoin §§20 and 22(a). Indeed, Petitioners so attempted but failed, not on the merits of their challenge, but as being out of time under a special statute of limitations, §10 of ANCSA. That litigation, however, never reached the question of the availability of equitable relief, holding §10 barred the action.[2]

[2] The precise holding of the Ninth Circuit in Paul v. Andrus found it necessary to sever a constitutionally offensive portion of §10 from the time and venue provisions of the section to sustain its application to that action. §10 literally barred that action at any time because it limited complainants to "authorized officials of the State of Alaska", which, of course, did not include these Petitioners.

Jurisdiction is, of course, the threshhold question. No matter the gravity of Petitioners' claim, if there be no jurisdiction, there be no power to grant any relief whatsoever. Louisville and Nashville R.R. v. Mottley, 211 U.S. 149 (1908). As far as the government goes, it is correct. However, it misconstrues Radford, supra and totally ignores Hurley v. Kinkaid, 285 U.S. 95 (1932), Duggan v. Rank 372 U.S. 609 (1963), Fresno v. California, 372 U.S. 627 (1963), Dames & Moore v. Regan, 453 U.S. 654 (1981) and most importantly, Shoshone Tribe v. U.S., 299 U.S. 476 (1937).

Radford was an action to, in effect, restrain the enforcement of certain depression occasioned amendments to the Federal Bankruptcy Code which gave secured property to a debtor free of a mortgagee's perfected lien, given certain other prescribed conditions. At issue was whether the bankruptcy power (Art. I, Sec. 8) authorized the Congress to so act; whether, in fact, such was a taking without due process of law and contrary to the Fifth Amendment. The Court, by

Justice Brandeis, held that the bankruptcy power was not so broad. The rationale was that the bankruptcy power was a known quantity with a generally accepted meaning at the time the Constitution was adopted; it was not plenary in scope. That known meaning clearly did not extend to the abrogation of secured property rights. To allow the Congress to so extend the meaning of the bankruptcy power clearly brought it into direct confrontation with the Due Process Clause of the Fifth Amendment. If the national interest required such power,

> "resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public." 295 U.S. at 602.

Here, the power is Indian commerce, an unknown quantity, akin to the foreign policy powers of the United States. These powers of the Congress and the Executive have been classically considered to raise non-justiciable questions, questions best left to the political departments of government. U.S. v. Curtis-Wright Export Corp., 229 U.S. 304 (1926); Dames & Moore v. Regan,

supra; Shoshone Tribe v. U.S., supra.

The issue is, under the Indian Commerce Clause, does Congress have the power to take property rights in the resolution of a major controversy involving aboriginal claims irrespective of what those rights might be. Petitioners maintain yes, it does. It raises questions charged by the Constitution and lawful authority to the political departments of government, unlike under the bankruptcy power. Thus, for Paul v. Andrus, supra to be controlling authority here the Court must be prepared to find that had the case been brought in time, there existed the power to grant relief sought. We submit, as in Dames & Moore, supra, the relief would have been denied, leaving the complainants to seek relief, if any, in the Court of Claims.

The acknowledgement of such power, however, does not reach the issue of just compensation. Though the government may take, it may also have to provide just compensation. So stated this court in Dames & Moore v. Regan, supra and, most importantly, Shoshone Tribe v. U.S.,

supra. In Shoshone Tribe, the United States had allowed the settlement of a band of Paiutes upon Shoshone treaty lands, thus diluting the real value of the reservation to the Shoshones to whom the land belonged. The Court held that the Indian commerce power allowed the Congress to reach so far, even to abrogate treaty rights, if done in "good faith" but

> "The power does not extend so far as to enable the government to give the tribal lands to others, or to appropriate them to its own purposes without rendering or assuming an obligation to render, just compensation. . ." 299 U.S. at 497.

This dichotomy isolates the issue before this Court. ANCSA awarded certain properties and monies to Alaska's Natives in a sum relatively certain. The attorneys' contract rights, if enforced, would in all probability dilute that award and the Congress decided to maximize the economic gain available to the Natives. It cannot be maintained, solely on a property analysis, that such action was not taken in good faith or is not comprehended by the Indian Commerce

Clause.[3]

However, though the government has the power to so act, remaining is the issue of whether or not it can do so without just compensation.

II. THE PRIOR DECISIONS OF THIS COURT ARE INAPPOSITE TO THE CASE AT BAR; THE QUESTIONS PRESENTED RAISE SUBSTANTIAL CONSTITUTIONAL ISSUES RELATIVE TO THE RIGHT TO COUNSEL, RIGHT TO PETITION, AND THE TAKING OF VESTED PROPERTY RIGHTS WITHOUT JUST COMPENSATION.

This case, above all else, is a right to counsel case. Appended hereto at a-1 is a statement of the Honorable Ted Stevens, Senator from Alaska, current Majority Whip of the Senate, a former Solicitor to the Department of the Interior and member of the Conference

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[3] Petitioners do not here advance the proposition that the Indian Commerce Clause is so all encompassing as to preclude injunctive or declaratory relief were the Congress to provide directly for a "prior restraint" or to deny a right to counsel. To the contary, Petitioners limit this posture solely to the power of Congress to take property rights.

Committee which reported the Alaska Native Claims Settlement Act to the full Congress. We believe this statement, combined with the positions advanced by the amici curiae which have appeared in this proceeding, fully demonstrates the severity and the breadth of the questions presented.

Senator Stevens takes great care in pointing out why he believes this case is "of substantial importance for the guidance of Congress and the judiciary". (a-2). He acknowledges the complexity of the issues considered by the Congress encom passed by ANCSA in general, with the concommitant depth of study by the Congress on those issues, in marked contrast to the consideration it gave to attorneys and their fees.

> "I hesitate to say we acted arbitrarily, but Congress gave little thought to this important matter." (a-5).

Pointedly and poignantly, he concludes his statement with the observation:

> "I do have great difficulty with §20 and §22(a) of ANCSA because they not only raise constitutional problems with respect to your claims, but also send a message for the future to other counsel that just compensation for services rendered to Native

> Americans will be denied. In my judgment the Natives of Alaska, for a variety of reasons, were essentially denied the ability to petition the Congress for the better part of one hundred years, not by laws, but in fact.
>
> "Congress should ask what other claims will come before us in the future, and who will be willing to represent those groups financially disadvantaged knowing that their claims for fees can be substantially reduced or voided retroactively? The answer is that few will take up the cause. That is why I believe that Native Americans, as a matter of constitutional intrepretation, should have no less right to effective counsel and advocacy in the petitioning of Congress." (a-6).

Sections 20 and 22(a) of ANCSA must be taken in the context of the regulation of attorneys, broadly speaking, in Indian affairs. The roots of Congress' regulation of attorneys in Indian affairs were born during the height of "manifest destiny" by a Congress in the early 1870's,[4] enormously suspicious of advocates who advanced Native causes, referencing them as a "class of avaricious and unprincipled claim-agents and

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[4] 25 USC §81 Act of March 3, 1871, c 120, Section 3, 16 Stat. 570; Act of May 21, 1872, c.177, Sections 1, 2, 17 Stat. 136.

middlemen"[5] who were "generally bankrupt in morals, religion and politics . . ."[6]

> "These claims . . . need no skilled attorneys or counsel outside of the departments which are able and willing to do justice, without cost to the Indian."[7]

It also ought be noted that prior to 1871, attorneys were totally barred from representing Indians with respect to claims against the government.[8]

This rather ignoble beginning led full circle by 1968 when the Congress adopted Title VI of the Indian Civil Rights Act.[9] Title VI required action by Interior on Section 81 contracts within 90 days of submission and was the product of enormous and frequent delays in the approval of such contracts by Interior

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5 Investigation of Indian Frauds, Report of the Committee on Indian Affairs, Report No. 98 42nd Cong., 3rd Sess., March 3, 1873, at p.2.

6 Id. at p.76.

7 Id. at p.5.

8 Act of March 3, 1853, 10 Stat. 226, 239.

9 25 USC §1331; Pub.L. 90-284, Title VI Section 601, April 11, 1968. 82 Stat. 80.

which, in the words of the Senate Judiciary Committee, had reached a point "tantamount to the denial of due process of law".[10]

In opening the hearings on Title VI, Senator Sam Ervin, Chairman of the Senate Judiciary Committee, observed, in acute contrast to the comments of the 1873 Indian Affairs Committee:

> "Because of the many unique laws affecting them, no group in the United States has had more problems requiring expert legal assistance than the American Indians."

Though the appreciation of Indian needs in legal representation evolved, the statutory regulatory mechanism has not. Other than the 90-day rule of Title VI. §81 has been amended but once since 1872 in a here, immaterial manner.[11]

The issue is of the gravest moment. The contracts here in question related to

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10 Constitutional Rights of the American Indian, Summary Report of Hearings and Investigations by the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, 88th Cong., 2nd Sess., on S.Res.265 (1964).

11 ¶2d Pub.L. 85-770 (1958) deleted requirement of execution before a court of record.

aboriginal claims in public domain lands,[12] lands in which the United States in general and the Department of Interior in particular, had an interest directly contrary to that of the Native claimants -- yet, it is the Secretary of the Interior who is charged with the discretionary authority under §81 to approve the retention and terms of compensation of counsel for the natives -- his adversaries. And yet, it is also this same individual with the fiduciary duty of a trustee to protect the Native position. U.S. v. Kagama, 118 U.S. 375 (1886).

It is an enigma of history, of law of common sense, that such legally sanctioned conflicts should be allowed to stand for such a long period of time. President Nixon, in calling for the creation of the office of "Indian Trust Council", the purpose of which was to remove Indian advocacy from Interior and

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[12] According to Alaska Natives and the Land, Fed. Field Comm. for Development Planning in Alaska, GPO (1968), 358 million of Alaska's 375 million acres were under federal control, 325 million acres of which were subject to Native aboriginal protests (at p. 453), eighty-seven percent of the entire state.

Justice, acknowledged the conflict,[13] as did Secretary of the Interior Rogers Morton[14] and Attorney General John Mitchell [15].

Despite extensive hearings on the issue,[16] however, nothing has changed. The effect of this reality is that Interior continues to fail to protect and advance the Native cause, further demonstrating the compelling need for counsel of the highest ability. See e.g. Edwardsen v. Morton, 369 F Supp. 1359

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13 "Recommendations for Indian Policy", Richard M. Nixon, House Doc. No 91-363, 91st Cong., 2nd Sess. (July 8, 1970).

14 Hearings on S.2035, Senate Subcommittee on Indian Affairs, 92nd Cong., 1st Sess. (November 22-23 1971) at p.13.

15 Remarks of Attorney General John Mitchell, Indian Economic Meeting, October 29, 1971.

16 "Indian Trust Council Authority" Senate Hearings on S.1012 and S.1339, 93rd Cong., 2nd Sess. (May 7-8, 1973); "Creation of the Indian Trust Council Authority" House Hearings on HR 6374 and HR 7494, 93rd Cong., 1st Sess. (August 6-September 18, 1973). See also A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources, 91st Cong., 2nd Sess., (December 15, 1970); Toward a New System for the Resolution of Indian Resource Claims, 47 NYU L.Rev. 1108 (1972).

(D.C., D.C., 1973)[17].

This condition, in analogous contexts has been strongly condemned by this Court. In Northern Pacific R.R. Co. v. U.S., 227 U.S. 355 (1913) at issue was a Yakima survey of its boundaries conducted by the government, which later was determined to be in error.

> "If the government may control the cession and control the survey, and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter but as effective as fraud. We should hesitate to put the government in that attitude." 227 U.S. at 366.

It is in this environment that Congress adopted ANCSA in December, 1971, 104 years after the acquisition of Alaska; 104 years of the indignity of squatting on "government-owned land".[18]

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17 Edwardsen held the Secretary of the Interior had failed to protect Eskimo aboriginal lands, pre-ANCSA, from third party trespasses and ordered the United States to sue such trespassers for damages. The action was brought by Petitioner Paul, on behalf of these clients, against the Secretary charged with approving the instant contracts. Enough said.

18 Tee-Hit-Ton v. U.S., 348 U.S. 272, 291 (1955); Petitioner Paul is a Tee-Hit-Ton of the Tlingit Nation.

But on December 19, 1971, it was no longer government-owned, it was their land And make no mistake, it was the lawyers that did it.

As in Northern Pacific, supra, if the Congress can control the selection of counsel and also determine compensation without minimal standards of fairness, it affords no lesser "a means of rapacity", as effective as fraud.

We can offer no further legal analysis as to the merits of our position than that offered in our Brief of Petitioners under the principal rationales of Arizona Grocery v. Atcheson R.R. Co., 284 U.S. 370 (1932), Perry v. U.S., 294 U.S. 330 (1934) and Mineworkers v. Illinois Bar Association, 389 U.S. 217 (1967). Suffice it to say, the exercise of apparent plenary, omnipotent power in the context of Native Americans' legitimate aspirations to resolve political and legal conflicts cannot be allowed to stand. The sentence is far to harsh in balance with the powers government otherwise enjoys.

CONCLUSION

The main thrust of the Respondent's brief is that on the merits, Petitioners should have lost below; therefore, the case is unworthy of review. We assert that on the merits, Petitioners have shown substantial arguments in their support, so that the court on review would have to reach the major issues of the Petition, Due Process, Just Compensation, Indian Commerce and Property Clauses and their reconciliation, one with another.

Secondly, it is time that the Court, through the Petition Clause, recognize the dignity of the office of a lawyer, that it is he who can bring social peace in our society, that without protecting such office the Court demeans the Petition Clause and delays the progress of social peace. The Petition Clause comprehends the right to counsel.

Respectfully,

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May 4, 1983

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Dear Barry,

Thank you for writing me concerning the Petition for Writ of Certiorari in Paul v. United States and Jackson v. United States.

I support the Petition for Writ of Certiorari, and am pleased to share with you the reasons for my support.

As you know as a former Solicitor for the Department of the Interior, holding that position from 1960 to 1961, and as a United States Senator from Alaska since 1968, I am intimately familiar with the congressional proceedings held upon, and the causes generating the need for the Alaska Native Claims Settlement Act (ANCSA).

I was a member of the conference committee which reported out the statute as enacted. I am also intimately familiar with the implementation of that Act and the Congress' consideration of amendments

to ANCSA in 1976. Alaska Native Claims Settlement Act Amendments, Pub. L. No. 94-204, 89 Stat. 1145 (1976) (codified at 43 U.S.C. §§1615-1627). Additionally, you also know that I was deeply involved in the D-2 legislation known officially as the Alaska National Interest Lands Conservation Act, Pub. L. 96-487, 94 Stat. 2371 (1980) (codified in scattered sections of 16, 43 U.S.C.).

It is not my intention in writing to take a position on the merits of your particular fee claim nor the procedural problems associated with bringing it. However, the general questions posed for resolution, in my judgment, are of substantial importance for the guidance of Congress and the Judiciary. The two issues presented which I consider important are: (1) whether the First Amendment petition clause comprehends the vesting, for just compensation purposes, of a contingent fee attorney's contract with an Indian tribe; and (2) whether the Fifth Amendment due process clause comprehends a retroactive abrogation of previously regulated attorneys' contracts, approved by federal agency action, and vested within the meaning of the just compensation clause. The presentation of these issues by you and your co-petitioners has caused me to reflect upon past Congressional action now approaching the 12-year mark. My remarks will be confined, however, to the First Amendment issue.

First, there were a number of issues concerning Alaska Natives. ANCSA is the legislative resolution to those problems,

and is the most significant departure from established American Indian policy ever enacted by the Congress. The Alaska Native settlement was not treated as a solution to the claims of Natives through quasi-sovereign tribal organizations, but through the creation of corporate entities, with unique Congressional directives. Because of the complexity of issues that ANCSA was intended to reach, the question of attorneys' fees payable to counsel for representing Natives was hardly considered at all, and certainly in no great depth.

Second, the oil industry had an enormous investment in exploratory operations on the North Slope, including almost $1 billion in risk capital paid to the State of Alaska in non-recourse mineral leases on unpatented land. The industry needed to construct the Trans-Alaska Pipeline, but environmental interests were extremely vocal with respect to problems associated with the pipeline's construction. Even with the authorization of the pipeline, related environmental questions were debated in Congress for an additional 10 years, resulting in the Alaska Lands legislation in 1980.

Finally, it should be noted that ANCSA has been described as the most complex piece of legislation ever enacted by the Congress. I do not know if that is true, but it is certainly quite an intricate piece of legislation. Its complexity was dictated by the various interests involved in its creation in the late 1960's. Paramount among those interests were those of the State which

was desperately in need of the land and tax base promised to it in the 1958 Statehood Act. The State's claims had been delayed for years by unsettled political, environmental and lands problems.

The attorneys' fee question with respect to Alaska Natives was quite different, both in theory and in practice, from the previous regulation of such Indian contracts. See 25 U.S.C.A. §81 (1983) [sic]. In Alaska, attorneys fee claims were approved on a statewide, rather than tribal basis. The regulatory scheme under §81 did not, at least on its face, provide for regional statewide approvals beyond the village level. Thus, when the Congress was considering the final version of ANCSA, it was noted by those involved that counsel for the Alaska Federation of Natives (AFN), a statewide association of regional and tribal groups and individuals, had no approved §81 contracts with the AFN. Many attorneys for regional or area associations were in similar situations. These attorneys had made an enormous contribution and it was clear that, absent a special provision in the statute, they would probably be barred for compensation for their services.

This, of course, would be an unacceptable consequence of the Act. Unfortunately, our legislative solution to the problem was too sweeping in nature. Rather than categorize counsel in §81 approved and non-approved groups, we took the path of least resistance by deciding to treat all retained attorneys the same by including in the Act the

language embodied in §22(a). This section voided all percentage contracts and required all attorneys and consultants to present claims, without differentiation, under §20 of the Act, against a two million dollar maximum fund. The modification was primarily to help the unprotected lawyers rather than to impact those with approved contract protections.

Barry, it is my recollection that there was no consideration of the due process or vesting implications of voiding previously approved and executed contracts for legal services. There was no substantial analysis of the services provided by various lawyers individually or in the aggregate. I hesitate to say we acted arbitrarily, but Congress gave little thought to this important matter.

Congress' action in this area raises some serious issues. I am especially troubled by the First Amendment issues raised by you and your co-petitioners. Since Watergate, Korea-gate and the self-analysis undertaken by the Congress of its own conduct, as well as that of other public officials, there is now a much more sophisticated understanding of ethics in government.

Even though still "chided" for their "contributions," lawyers and lobbyists are an absolutely essential part of the process which helps the Congress define, mold and develop the national conscience on a variety of public issues. The extent to which lawyers and lobbyists have access to our chambers and staffs, given the enormity of the issues we

confront, is in direct proportion to the amount of time and consideration we give a problem.

During consideration of ANCSA, the lobbying effort was extensive, encompassing the oil industry, the State of Alaska, the Alaska Chamber of Commerce, the environmental movement, the Alaska Natives and many other interests. Any one of these interest groups which is inadequately represented on legislation like ANCSA may suffer in the balance, unlike those that are afforded adequate representation before the Congress.

I do have great difficulty with §20 and §22 of ANCSA because they not only raise constitutional problems with respect to your claims, but also send a message for the future to other counsel that just compensation for services rendered to Native Americans will be denied. In my jdugment the Natives of Alaska, for a variety of reasons, were essentially denied the ability to petition the Congress for the better part of 100 years, not by laws, but in fact.

Congress should ask what other claims will come before us in the future, and who will be willing to represent those groups financially disadvantaged knowing that their claims for fees can be substantially reduced or voided retroactively? The answer is that few will take up the cause. That is why I believe that Native Americans, as a matter of constitutional interpretation, should have no less right to effective counsel and advocacy in the petitioning

of Congress. Again, it is my hope that the questions you have raised will be addressed by the Supreme Court, and you have my permission to use this statement in any of the mateirals that you do submit to the Court in support of your case.

Thank you again for bringing your case to my attention.

With best wishes,

Cordially,

/s/ TED STEVENS

Ted Stevens

(Original telecopy letter of Senator Stevens is in the offices of Blair F. Paul, counsel of record for Petitioners.)